

BARRY E. HINKLE, Bar No. 071223  
 KRISTINA L. HILLMAN, Bar No. 208599  
 KRISTINA M. ZINNEN, Bar No. 245346  
 WEINBERG, ROGER & ROSENFELD  
 A Professional Corporation  
 1001 Marina Village Parkway, Suite 200  
 Alameda, California 94501-1091  
 Telephone (510) 337-1001  
 Facsimile (510) 337-1023

Attorneys for Plaintiffs

E-filing

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA

EMC

THE BOARD OF TRUSTEES OF THE ) No.  
 CARPENTERS HEALTH AND WELFARE )  
 TRUST FUND FOR CALIFORNIA; )  
 CARPENTERS VACATION-HOLIDAY )  
 TRUST FUND FOR NORTHERN )  
 CALIFORNIA; CARPENTERS PENSION )  
 TRUST FUND FOR NORTHERN )  
 CALIFORNIA; CARPENTERS ANNUITY )  
 TRUST FUND FOR NORTHERN )  
 CALIFORNIA; and CARPENTERS TRAINING )  
 TRUST FUND FOR NORTHERN )  
 CALIFORNIA; CARPENTERS 46 )  
 NORTHERN CALIFORNIA COUNTIES )  
 CONFERENCE BOARD for itself and on behalf )  
 of the NORTHERN CALIFORNIA )  
 CARPENTERS REGIONAL COUNCIL )

MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT OF  
 PETITION TO CONFIRM  
 ARBITRATION AWARD

Plaintiffs,

v.

ACOUSTICTEC, A California Corporation,

Defendant.

This Memorandum is filed in support of Plaintiffs' Petition to Confirm Arbitration Award.

This action involves a dispute which arose under a written collective bargaining agreement (herein after referred to as "CBA" or "Agreement"). The CBA sets forth a method for resolving disputes over the interpretation and/or application of the Agreement. Under the term of the CBA, said disputes are submitted to an impartial Board of Adjustment or an Arbitrator and the decisions of

the Board of Adjustment or the Arbitrator are final and binding upon the parties. By way of the present Petition, Plaintiffs seek to compel the Defendant to comply with the Decision and Award of Arbitrator Gerald R. McKay dated April 11, 2007 (hereinafter the "Award"), issued pursuant to the terms of the CBA. Furthermore, Plaintiffs seek an Order of this Court confirming said Award, and making it a judgment of this Court.

**I. THE PARTIES AGREED THAT THE QUESTION WOULD BE RESOLVED BY AN ARBITRATOR**

By virtue of the terms and conditions of the CBA, the parties agreed that an arbitrator's decision would be final and binding on all parties. Under such circumstances, and having voluntarily submitted the dispute to arbitration by naming an arbitrator, the employer cannot now contest the decision of Arbitrator Gerald R. McKay. In Ficek v. Southern Pacific Co., 338 F.2d 655 (9th Cir. 1964) cert. denied, 380 U.S. 988 (1965), the Ninth Circuit stated:

A claimant may not voluntarily submit his claim to arbitration, await the outcome, and, if the decision is unfavorable, then challenge the authority of the arbitrator's act.

Ficek, 338 F.2d at 657.

Having agreed to submit this dispute to arbitration, the employer cannot now argue that it was not arbitrable. See also International Brotherhood of Teamsters v. Washington Employers, Inc., 557 F.2d 1345, 1349-50 (9th Cir. 1977); International Association of Machinists and Aerospace Workers, Dist. 776 v. Texas Steel Co., 538 F.2d 1116, 1120 (5th Cir. 1976).

**II. THE ARBITRATOR'S DECISION MEETS THE APPLICABLE TESTS FOR VALIDITY**

The Ninth Circuit has defined the district courts' power with respect to the review of arbitration awards as follows:

Judicial Review of arbitration awards is limited. An award is legitimate so long as it "draws its essence" from the collective bargaining agreement and does not "manifest an infidelity" to the agreement. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597-99, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). "[I]f, on its face, the award represents a plausible interpretation of the contract in the context of the parties' conduct, judicial inquiry ceases and the award must be affirmed." Holly Sugar Corporation v. Distillery Union, 412 F.2d 899, 903 (9th Cir. 1969).

1 Riverboat Casino, Inc. v. Local Joint Executive Board of Las Vegas, 578 F.2d 250, 251 (9th Cir.  
2 1978).

3 In this case, this Court could overturn the award in question only if it found the reasoning  
4 "so palpably faulty no judge, or group of judges could ever conceivably have made such a ruling."  
5 Safeway Stores v. Bakery Workers Local 111, 390 F.2d 79, 82 (5th Cir. 1968). The award herein  
6 clearly meets the test of being a viable, valid award. The Court is "not empowered to review the  
7 merits of an arbitration award which draws its essence from a collective bargaining agreement."  
8 Painters Local Union No 171 v. Williams & Kelly, Inc., 605 F.2d 535, 538 (10th Cir. 1979).

9 The United States Supreme Court has clearly spoken on the role of the courts in enforcing  
10 awards of arbitrators involving the interpretation of collective bargaining agreements in  
11 relationships between labor and management. The Court sustains the notion that voluntary  
12 arbitration agreements should not be lightly treated by the courts or other institutions dealing with  
13 labor-management relations and such awards be given the highest weight. Thus, the Court stated  
14 in United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960):

15 When an arbitrator is commissioned to interpret and apply the collective  
16 bargaining agreement, he is to bring his informed judgment to bear in order  
17 to reach a fair solution of the problem. This is especially true when it comes  
18 to formulating remedies. There the need is for flexibility in meeting a wide  
19 variety of situations. The draftsman may never have thought of what  
20 specific remedy should be awarded to meet a particular contingency.  
21 Nevertheless, an arbitrator is confined to interpretation and application of  
22 the collective bargaining agreement; he does not sit to dispense his own  
23 brand of industrial justice. He may of course look for guidance from many  
24 sources, yet his award is legitimate only so long as it draws its essence from  
25 the collective bargaining agreement. When the arbitrator's words manifest  
26 an infidelity to this obligation, courts have no choice but to refuse  
27 enforcement of the award.

28 The tests set forth in Enterprise must be applied hereto and a judgment confirming the  
award be granted. In Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1128 (3rd Cir. 1969),  
the Third Circuit clearly stated that the award must be upheld "if the interpretation can in any  
rational way be derived from the agreement, viewed in the light of its language, its context, and  
any other indicia of the parties' intention...". See also United Steelworkers v. Warrior & Gulf, 363  
U.S. 574, 582 (1960); Operating Engineers Local 150 v. Flair Builders, Inc., 406 U.S. 476 (1972);

1 Northern California District Council of Hod Carriers v. Pennsylvania Pipeline, Inc., 103 Cal. App.  
2 3d 163, 170 (1980).

3 It has further been uniformly held that where the contract is not explicit concerning the  
4 proper remedy, the arbitrator, or a Board of Adjustment, is given wide latitude in fashioning an  
5 appropriate one. Mogge v. District 8, International Association of Machinists, 454 F.2d 510, 514  
6 (7th Cir. 1971). The Ninth Circuit states the rule thus: "[I]f on its face, the award represents a  
7 plausible interpretation of the contract in the context of the parties' conduct, judicial inquiry ceases  
8 and the award must be affirmed." Holly Sugar Corp. v. Distillery, Rectifying, Wine & Allied  
9 Workers International Union, 412 F.2d 899, 903 (9th Cir. 1969)

### 10 **III. PLAINTIFFS ARE ENTITLED TO AN AWARD OF ATTORNEYS' FEES IN** 11 **THESE PROCEEDINGS**

12 Plaintiffs have been required to secure the services of counsel for the prosecution and  
13 enforcement of the Award. Because Defendant's refusal to comply with the arbitration award is  
14 unjustified and in bad faith, Plaintiffs seek attorneys' fees and costs incurred in obtaining  
15 compliance with the award.

16 The Supreme Court has held that attorneys' fees can be awarded "when the losing party has  
17 acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Alyeska Pipeline Service Co.  
18 v. Wilderness Society, 421 U.S. 240, 258-59 (1975). In 1983, the Ninth Circuit Court of Appeals  
19 applied that rule in a case where, as here, an employer refused to abide by the award of an  
20 arbitrator. In International Union of Petroleum and Industrial Workers v. Western Industrial  
21 Maintenance, Inc., 707 F.2d 425 (9th Cir. 1983), the court held that:

22 "[B]ad faith may be demonstrated by showing that a defendant's obstinacy  
23 in granting a plaintiff his clear legal rights necessitated resort to legal action  
24 with all the expense and delay entailed in litigation." Huecker v. Milburn,  
25 538 F.2d 1241, 1245 n.9 (6<sup>th</sup> Cir. 1976) The award of attorneys' fees in the  
26 latter context satisfies a dual purpose -- deterrence and compensation. The  
27 threat of an award of attorneys' fees tends to deter frivolous dilatory tactics.  
28 The award also compensates a plaintiff "for the added expense of having to  
vindicate clearly established rights in court." *Id.*

Western Industrial, 707 F.2d at 428.

The Ninth Circuit has also held that "an unjustified refusal to abide by an arbitrator's award

1 may equate [with] an act taken in bad faith, vexatiously or for oppressive reasons." Id. at 428. The  
 2 court ruled that the employer did not present justifiable grounds for the invalidity of the arbitration  
 3 award, rejecting the contention that one of the issues was not arbitrable.

4 Unjustified refusal to abide by an arbitrator's award can be, in and of itself, an act taken in  
 5 bad faith, vexatiously or for oppressive reasons. Sheetmetal Workers' Int'l Ass'n, Local Union  
 6 No. 359 v. Madison Industries, Inc. of Arizona, 84 F.3d 1186, 1191 (9th Cir. 1996) (noting that  
 7 employer failed to file a petition to vacate the award and requested a vacation only in response to  
 8 the Union's petition to confirm it).

9 Arbitration is a fundamental foundation for stable national labor relations policy, and  
 10 advances the effective resolution of disputes and the furthering of industrial stabilization.  
 11 Therefore, "the deterrence aspect of an award of attorneys' fees is particularly served where a party,  
 12 without justification, refuses to abide by an arbitration award." Western Industrial, 707 F.2d  
 13 at 428.

14 The District Court has the power to award attorneys' fees and expenses to the prevailing  
 15 party in a suit to enforce an arbitration award if the losing party acted in bad faith. There must be  
 16 an unjustified refusal to abide by the arbitrator's decision, and the objections to an award must be  
 17 frivolous. The failure of the party opposing a decision to take timely action to challenge it on valid  
 18 grounds, thus forcing the other party to undertake the time consuming and burdensome expense of  
 19 an enforcement action, are factors in determining bad faith. See, Courier-Citizen Co. v. Boston  
 20 Electrotypers Union No. 11, 702 F.2d 273, 282 (1st Cir. 1983) (endorsing attorneys' fees award  
 21 "when a party 'without justification' contests an enforceable award") United Steelworkers of  
 22 America v. United States Gypsum Co., 492 F.2d 713, 724 (5th Cir.) cert. denied, 419 U.S. 998  
 23 (1974). ("The district court has the authority to award attorneys' fees where it determines that a  
 24 party has without justification refused to abide by an award of an arbitrator."). Actors Equity v.  
 25 American Dinner Theater, 802 F.2d 1038 (8th Cir. 1986); Local 34 Asbestos Workers v. General  
 26 Pipe Covering, 792 F.2d 96 (8th Cir. 1986); United Automobile Workers v. United Farm Tools,  
 27 Inc., 762 F.2d 76, 77 (8th Cir. 1985).

28

1 In the present case, the parties to a collective bargaining agreement included in their  
 2 agreement an inexpensive and efficient dispute resolution mechanism: the grievance arbitration  
 3 procedure. This is one of the most important provisions of a collective bargaining agreement  
 4 entered into between an employer and a Union on behalf of its members. In most cases, employees  
 5 give up the right to strike during the term of a contract in return for the employer's promise to  
 6 submit all "grievances" to a neutral arbitrator for final and binding decision. Moreover, both  
 7 parties benefit from the existence of this mechanism designed to provide an inexpensive and  
 8 efficient resolution of disputes. By refusing to comply with a final and binding arbitration award,  
 9 Defendant has subverted a fundamental provision of the agreement.

10 Furthermore, the Defendant has provided no reason why it refused to implement the award.  
 11 Because it has caused unnecessary expense and delay, and has failed to set forth any meritorious  
 12 arguments to justify its conduct, the Court should issue an order confirming the arbitration award  
 13 and awarding Plaintiffs their reasonable attorneys' fees as provided by law.

#### 14 IV. CONCLUSION

15 For the reasons stated above, it is respectfully submitted that the Decision of Arbitrator  
 16 Gerald R. McKay should be confirmed in all respects, made a Judgment of this Court and the  
 17 Court should award the Plaintiffs their attorneys fees and costs.

18 Dated: February 25, 2008

19 WEINBERG, ROGER & ROSENFELD  
 20 A Professional Corporation

21 By: 

22 KRISTINA M. ZINNEN  
 23 Attorneys for Plaintiffs

24 117540/475112